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STATES OF KANSAS AND MISSOURI, [illegible]

Petitioners,

v.

UTILICORP UNITED INC.,

Respondent.

[illegible] to the United States [illegible] for the Tenth Circuit

[illegible] CURIAE [illegible] FEDERATION [illegible]

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QUESTION PRESENTED

In a private antitrust action under 15 U.S.C. § 15 involving claims of price fixing against the producers of natural gas, is a State a proper plaintiff as *parens patriae* for its citizens who paid inflated prices for natural gas, when the lawsuit already includes as plaintiffs those public utilities who paid the inflated prices upon direct purchase from the producers and who subsequently passed on most or all of the price increase to the citizens of the State?[1]

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[1] This is the question that the district court below certified for interlocutory appellate review at the request of the States who are the petitioners here. It is the question that was addressed by both the district court and the court of appeals below. *Wyoming Tight Sands Antitrust Cases*, 695 F.Supp. 1109, 1120 (D. Kan. 1988), *aff'd*, 866 F.2d 1286, 1289 (10th Cir. 1989) ("*Tight Sands*"). However, the States now ask this Court to address two variations on this question, each of which asserts that the utilities passed on *all* of the price increase. And they devote a significant part of their brief to arguing that the utilities in fact did pass on all of the price increase -- a factual question not resolved below.

It is inappropriate to ask this Court to resolve a question of fact. Also, as we discuss below, it is not likely that the utilities passed on *all* of the price increase, notwithstanding the States' regulatory schemes. We respectfully submit that the Court should therefore address the same question as the courts below.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

No. 88-2109

THE STATES OF KANSAS AND MISSOURI,
AS PARENS PATRIAE,

Petitioners,

v.

UTILICORP UNITED INC.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF OF AMICUS CURIAE
THE WASHINGTON LEGAL FOUNDATION
IN SUPPORT OF THE RESPONDENT

INTEREST OF THE AMICUS[2]

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[2] Counsel for all parties have consented to the filing of this *amicus* brief. Their written consents are on file with the Clerk of this Court.

The Washington Legal Foundation ("WLF") is a national nonprofit public interest law center with more than 120,000 members throughout the United States. WLF engages in litigation in matters promoting the free enterprise system, and the economic and civil liberties of individuals and businesses.

WLF believes that effective, rational enforcement of the antitrust laws supports the nation's free enterprise system. As this Court has observed:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Northern Pacific Railway v. United States, 356 U.S. 1, 4 (1958). WLF also recognizes, however, that if the antitrust laws are not applied effectively and rationally, they can become fetters upon competition, and deny consumers the benefits of "unrestrained interaction of competitive forces." Therefore, it is important both that the courts interpret the antitrust laws to prohibit only conduct that actually reduces consumer welfare, and that the courts deal efficiently with such conduct in order to deny those who conspire against the public interest any profit from their conduct and to deter others from following the same course. The question presented in the case at Bar concerns how best to ensure effective enforcement of the antitrust laws.

In this brief, we hope to bring to the attention of the Court relevant matter that has not already been brought to its attention by the parties. WLF brings a unique perspective to this case because it is committed to promoting and defending "free and unfettered competition as the rule of trade," and has no other interest in the resolution of this case, political or economic.

STATEMENT OF THE CASE

Utilicorp United Inc. ("Utilicorp") and The Kansas Power and Light Company ("KP&L") are public utilities operating in Kansas, Missouri, Nebraska and Oklahoma.[3] They purchase natural gas both for their own use in generating electricity, and for resale to their industrial, commercial and residential customers. They have brought suit under Section 4 of the Clayton Act, 15 U.S.C. § 15, alleging that certain natural gas producers in Wyoming and a pipeline company that transports gas from Wyoming to Utilicorp and KP&L conspired to raise the price of the natural gas in violation of the antitrust laws. The utilities claim as their damages both the extra cost of the natural gas they purchased, and the profits they would have earned on the additional natural gas they would have purchased and resold if the price had not been inflated as a result of the illegal conspiracy. The defendant natural gas producers and pipeline asserted as an affirmative defense that the utilities passed on any illegal overcharges to their customers, and therefore had not suffered any injury themselves.

The petitioners, the States of Kansas and Missouri, also have filed complaints against the same producers

[3] When the writ of certiorari was granted, both of these companies were respondents. Subsequently, on March 22nd, the writ was dismissed as to KP&L pursuant to a stipulation among the parties. However, KP&L remains a plaintiff in this action.

and pipeline. The States seek to recover both the additional cost of gas purchased directly from the defendant pipeline by state agencies and municipalities, and, as *parens patriae* pursuant to Section 4C of the Clayton Act, 15 U.S.C. § 15c, the additional cost of natural gas purchased by residential gas customers in their states. Those customers purchased the gas directly from the utilities, and only indirectly from the defendant pipeline. The States do not seek to recover on behalf of any of the utilities' industrial or commercial customers, or on behalf of residential customers in Nebraska and Oklahoma. Purchases as to which the States seek to recover damages constitute less than 50% of the natural gas sold by the Utilicorp and KP&L.

The utilities moved to strike the defendants' "pass-on" affirmative defense, or in the alternative for partial summary judgment on that defense, and the district court granted partial summary judgment in favor of the utilities. The district court also recognized that the utilities' motions were "in reality, motions to dismiss the States of Kansas and Missouri in their *parens patriae* capacity," and *sua sponte* dismissed those aspects of the States' complaints. Thus, under the district court's decision, the utilities would be permitted to recover any illegal overcharge on all the gas they purchased from the pipeline, including all the gas they resold to customers, and the States would be permitted to recover any illegal overcharge on gas they or their subdivisions purchased directly from the pipeline. The utilities also would be entitled to recover the lost profits on any additional gas they would have sold absent the illegal overcharge.

The States sought and secured interlocutory appellate review of the district court's dismissal of their *parens patriae* claims. The court of appeals affirmed the district court's decision. On petition by the States,

this Court issued a writ of certiorari on January 16, 1990.

SUMMARY OF ARGUMENT

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) ("*Illinois Brick*"), and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) ("*Hanover Shoe*"), this Court established a general rule that only those who purchase directly from price-fixers or other antitrust law violators may recover damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, for injury suffered as a result of the violation. This general rule bars indirect purchasers from securing compensation for any injury they suffer; instead, direct purchasers may secure compensation for both the injury they suffer and the injury indirect purchasers suffer.

From the outset, the Court recognized that this rule is not perfect. In a perfect world, every person injured as a result of an antitrust law violation would secure redress to the extent of its injury. But as the Court implicitly recognized, sometimes pursuing perfection can get in the way of achieving a good result. The Court observed that trying to determine the actual injury suffered by each person in a chain of purchasers "would require a convincing showing of . . . virtually unascertainable figures," and thus "[t]reble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories." *Hanover Shoe*, 392 U.S. at 493.

The Court also noted that each ultimate consumer would most likely have suffered little injury, and "would have only a tiny stake in a lawsuit and little interest in attempting a class action." *Id.* at 494. The Court was concerned that because of this, if antitrust injury had to be perfectly apportioned, no one might

bring suit against those who violated the antitrust laws, and the violators thus "would retain the fruits of their illegality." *Id.* As the Court explained in *Illinois Brick*, "[h]owever appealing [an] . . . attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness." 431 U.S. at 737.

General rules tend to have exceptions, and the Court has recognized a possible exception to the general rule against antitrust recovery by indirect purchasers. Specifically, the Court has indicated that a pass-on defense might be recognized, and a claim for damages by an indirect purchaser might be permitted, where the direct purchaser suffers *no* injury -- no uncompensated overcharge, and no lost profits -- because its customers are "committed to buying a fixed quantity regardless of price." *Illinois Brick*, 431 U.S. at 736.[4] The Court has stressed, however, the "narrow scope" of this exception, *id.* at 745, and has rejected "attempts to carve out exceptions . . . for particular types of markets." *Id.* at 744.

In the case at Bar, the States ask the Court to carve out an exception for a particular type of market, *i.e.*, for regulated markets where the regulatory scheme forces the direct purchaser to pass on most or all of any illegal overcharge. The States recognize that even if all of any illegal overcharge by the pipeline was passed on to the utilities' customers, the utilities have suffered some injury: lost profits on additional sales they would

[4] The Court has also said that "the pass-on defense might be permitted . . . where the direct purchaser is owned or controlled by its customer." *Illinois Brick*, 431 U.S. at 736 n.16. This exception is not relevant to the case at Bar because the utilities are neither owned nor controlled by their customers.

have made if the price of gas had been lower. The States also recognize that they cannot recover on behalf of the utilities' industrial or commercial customers, or on behalf of the residential customers in Nebraska and Oklahoma. Thus, even if the States' plea for a new exception were granted, the utilities would still have damage claims they could pursue. However, whether those claims would be large enough to induce the utilities to go through another 5-10 years of litigation is another question.

The States' proposed new exception should be rejected. Indeed, it seems to be included within two proposed exceptions that the Court has already rejected: for where "middlemen . . . resell goods without altering them," and for where "most of the overcharge is purportedly passed on." *Illinois Brick*, 431 U.S. at 743. What distinguishes these situations from the one exception that the Court has recognized -- where there is a cost-plus contract for a fixed quantity -- is that in the latter, the direct purchaser has suffered *no* injury whatsoever.

This is the correct place at which to draw the line on exceptions to the general rule against recovery by indirect purchasers. Where the direct purchaser has suffered injury for which no one else can recover damages, permitting indirect purchasers to recover some of their damages will substantially complicate the litigation and reduce the incentive for direct purchasers to pursue their claims, thus reducing the likelihood that the violators will ever be forced to disgorge all the fruits of their illegal behavior. Therefore, effective enforcement of the antitrust laws requires that the decision of the courts below be affirmed.

ARGUMENT

I. THIS CASE DOES NOT FIT WITHIN THE NARROW EXCEPTION TO THE DIRECT PURCHASER RULE ESTABLISHED BY *ILLINOIS BRICK*.

Since this case concerns who should be able to recover for antitrust injury, it is important to bear in mind that there are actually *three* types of injury that flow from price-fixing and other unreasonable agreements in restraint of trade. First, those who purchase the product pay more than they otherwise would -- what is referred to as the "overcharge." The direct purchaser may pass on some or all of this overcharge, in which case indirect purchasers are affected by it, too. Second, to the extent the direct purchaser resells the product -- with or without altering it -- the direct purchaser will resell less at the inflated price, and therefore lose the profit it would have earned on the additional sales it would have made at the non-inflated price. And finally, direct and indirect purchasers are injured to the extent they purchase other products to substitute, at a higher cost, for the product whose price is illegally inflated. For example, a utility that uses a mix of natural gas and coal to generate electricity will likely purchase more coal if the price of natural gas is artificially inflated. Similarly, consumers may purchase oil-fired furnaces instead of gas furnaces, or may purchase extra sweaters, or may just tolerate colder temperatures in their homes, if the price of natural gas is artificially inflated.

The lost profits of the direct purchasers and the substitution costs of the indirect purchasers are directly related: if the price of the product were not inflated, the indirect purchasers would spend their money on the product instead of the substitutes, and the direct purchaser would earn its profits on those sales. Therefore, it would be duplicative to permit recovery of both the direct purchaser's lost profits and the indirect purchasers' substitution costs. And as difficult as it may be to determine lost profits, it is still far easier than attempting to determine substitution costs.

Ideally, whenever prices are artificially inflated as a result of an antitrust law violation, each person who suffers any injury would recover its damages. As a practical matter, however, calculating these damages would be extremely difficult, if not impossible -- and even just making the effort would necessitate extremely long and complex proceedings. This tension between perfection and reality is the focus of *Hanover Shoe* and *Illinois Brick*.

In *Hanover Shoe*, the plaintiff shoe manufacturer alleged that it had been injured by the defendant machinery manufacturer's refusal to sell, and insistence upon leasing, its machinery -- behavior that had earlier been found to be an antitrust violation. The defendant argued, however, that the plaintiff had not really been injured because any extra cost it had incurred was passed on to its customers in the form of higher prices.

This Court did not reject this argument as a theoretical proposition. It was concerned instead with the practical implications of permitting such a defense. First, the Court was concerned that this would greatly complicate already complicated treble-damage actions. The Court observed that "[a] wide range of factors influence a company's pricing policies," that it is also "difficult to determine, in the real economic world rather than an economist's hypothetical model, . . . what effect a change in a company's price will have on its total sales," that "costs per unit for a different volume of total sales are hard to estimate," and that even if all

this were done, "there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued." 392 U.S. at 492-93. The Court therefore concluded that permitting the passing-on defense "would often require additional long and complicated proceedings involving massive evidence and complicated theories." *Id.* at 493.

The Court's second concern was that permitting the passing-on defense would reduce the likelihood that anyone would actually bring suit, and therefore increase the likelihood that those who violate the antitrust laws "would retain the fruits of their illlegality." *Id.* at 494. The Court observed correctly that if the passing-on defense were permitted all the way down the chain of purchasers, the people entitled to assert claims would be ultimate consumers, who "would have only a tiny stake in a lawsuit and little interest in attempting a class action." *Id.*

Therefore, the Court concluded that as a general rule, an antitrust law violator would not be permitted to assert a passing-on defense.

These considerations were revisited in *Illinois Brick*, with the same result. In that case, the State of Illinois brought suit on behalf of itself and 700 local governmental entities, alleging that the defendant manufacturers of concrete blocks had fixed prices on those blocks in violation of the antitrust laws. These bricks were purchased from the defendants by masonry contractors and used by them to build masonry structures; those structures then were incorporated into entire buildings by general contractors, who sold the complete projects to the plaintiffs. Thus, the plaintiffs were

indirect purchasers of the blocks, three levels down from the unlawful conspiracy.

The Court held again that as a general rule, "the overcharged direct purchaser should be deemed for purposes of § 4 to have suffered the full injury from the overcharge." 431 U.S. at 726, 746. It reiterated its concern about the practical effect of trying to trace effects beyond direct purchasers, observing that "[h]owever appealing [an] . . . attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness." *Id.* at 737. The Court was greatly concerned about reducing the incentive for direct purchasers to bring treble-damage actions, fearing that this "could seriously impair this important weapon of antitrust enforcement." *Id.* at 745.

Even as the Court established the general rule that only direct purchasers would have standing to sue under Section 4 of the Clayton Act, it acknowledged that there could be exceptions:

> We recognize that there might be situations -- for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged -- where the considerations requiring that the passing-on defense not be permitted . . . would not be present.

Hanover Shoe, 392 U.S. at 494. In fact, however, an overcharged buyer with a "cost-plus" contract will be damaged -- in terms of lost profits -- unless its customer is obligated to buy as much of the product at the inflated price as at a lower price. Perhaps for this reason, the Court clarified this exception in *Illinois Brick*, limiting it to situations where "the [direct]

purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price." 431 U.S. at 736. Plainly, this exception does not apply to the situation at Bar: none of the utilities' residential customers are committed to buying a fixed quantity of natural gas regardless of price.

The Court in *Illinois Brick* stressed "the narrow scope it intended for any exception" to the general rule. *Id.* at 735-36. It acknowledged that the difficulties and uncertainties that had been the focus of its concern in *Hanover Shoe* "will be less substantial in some contexts than in others," but the Court rejected the idea of "carv[ing] out exceptions to the *Hanover Shoe* rule for particular types of markets." *Id.* at 743-44. As the Court explained:

> the process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the *Hanover Shoe* rule was meant to avoid. The litigation over where the line should be drawn in a particular class of cases would inject the same "massive evidence and complicated theories" into treble-damages proceedings, albeit at a somewhat higher level of generality. . . . *Hanover Shoe* itself implicitly discouraged the creation of exceptions to its rule barring pass-on defenses, and we adhere to the narrow scope of exemption indicated by our decision there.

Id. at 744-45.

II. THE COURT SHOULD DECLINE TO CARVE OUT A NEW EXCEPTION TO THE HANOVER SHOE/ILLINOIS BRICK RULE.

Notwithstanding this discouragement, the States in the case at Bar are asking the Court to carve out an exception to the *Hanover Shoe/Illinois Brick* rule for a particular type of market. We respectfully submit that the Court should again decline to do so.

The States first argue that as a result of their regulatory schemes, the entire overcharge to the utilities on the gas they sold to residential customers was passed on to those customers, and is easy to compute. This is, however, an unresolved question of fact: the district court made no findings of fact concerning how much of the natural gas overcharges were passed on to the utilities' industrial, commercial or residential consumers. Moreover, it is intuitively implausible that *all* of any overcharge was passed on even to the residential consumers. For example, there may be a time lag between when the price changes on gas purchased by the utilities and when they adjust the rate their residential customers pay for gas. Some consumers may move or for other reasons terminate their service during that time period. What happens to the overcharge attributable to the gas they used? Perhaps only a relatively small proportion of any overcharge is not passed on, but calculating it would likely entail the "massive evidence and complicated theories" that this Court has said should not be introduced into treble-damage actions. *Hanover Shoe*, 392 U.S. at 493; *Illinois Brick*, 431 U.S. at 745.

Furthermore, even if the entire overcharge on the gas used by residential customers was passed on to them and could be calculated easily, denying the utilities the right to recover this element of the antitrust injury would reduce their incentive to sue. The States

agree that only the utilities may seek damages as to some of the antitrust injury -- such as the overcharges borne by the utilities themselves and by their industrial and commercial customers, and the utilities' lost profits, which reflect their customers' substitution costs. Any reduction in the utilities' incentive to sue increases the likelihood that they will not sue -- and that therefore the price-fixers will retain some of the fruits of their unlawful activity. Avoiding this is the second major goal of the *Hanover Shoe/Illinois Brick* general rule.

Even assuming a perfect pass-on of any overcharges, there would still be a critical difference between the situation here and the exception suggested in *Hanover Shoe* and *Illinois Brick*: here, no customer is committed to buying a fixed quantity regardless of price. The States argue (Brief at 22) that this Court "cannot have intended to prescribe a mechanical 'fixed-quantity' test for determining whether to allow indirect purchaser suits," citing *Illinois v. Panhandle Eastern Pipe Line Company*, 852 F.2d 891 (7th Cir.), *cert. denied*, 109 S. Ct. 543 (1988) ("*Panhandle Eastern*"). The States assert (Brief at 22) that "[t]he importance of a fixed-quantity contract is to ensure that the direct purchaser has passed on the entire overcharge rather than absorbing some of it to avoid losing customers."

We disagree. The cost-plus aspect of a cost-plus/fixed-quantity contract tends to ensure that the entire overcharge has been passed on to the indirect purchaser. The purpose of the fixed-quantity requirement is to ensure that the entire injury has been borne by the indirect purchaser.

If there is a perfect pass-on of the overcharge without a fixed-quantity requirement, one part of the antitrust injury -- the lost profits -- will be suffered by the direct purchaser, and another part -- the overcharge

-- will be suffered by the indirect purchaser. As a result, neither might have the incentive to sue. To avoid this, the Court authorized the direct purchaser to sue for the overcharge, too. By contrast, with a fixed-quantity requirement, the full burden of the antitrust law violation falls upon the indirect purchaser because the direct purchaser does not suffer any lost profits, and therefore the indirect purchaser has as much incentive to sue as anyone could have.[5]

The States also argue that the utilities might not have sufficient incentive to sue because the state regulatory authorities might order the utilities to pass on any recovered overcharges to their customers. But as the court of appeals observed, "a utility filed first in this case. . . . It is reasonablee to assume that the public utilities must believe there is something for their benefit in pursuing these actions." *Tight Sands*, 866 F.2d at 1291-92. Moreover, the States can ensure that utilities have incentive to sue whenever they suffer antitrust injury by refusing to include in a utility's rate base any costs incurred as a result of an antitrust law violation for which the utility does not seek redress.

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[5] In *Panhandle Eastern*, the Seventh Circuit misapprehended the significance of the fixed-quantity requirement. That court's confusion is further evidenced by its statement that a requirements contract is the equivalent of an agreement to take a fixed quantity. 852 F.2d at 898. Judge Posner wrote for the court that "a buyer under a requirements contract does not have discretion as to the amount to take under the contract," *id.*, but this simply is not correct. The buyer under a requirements contract has total discretion as to the amount to take under the contract; it is bound only not to buy any of the product from any other source. If the price of the product goes up, the buyer may -- and most likely will -- purchase less of it. Indeed, the residential customers of the utilities here had, in effect, requirements contracts with the utilities for their natural gas: as a practical matter, they had to purchase all their natural gas from the utilities, but they could (and did) reduce their purchases as the price of natural gas increased.

The States contend (Brief at 17) that "state attorneys general, as representatives of the consumers actually sustaining damages, are the most reliable parties to pursue the overcharges," and point to the fact that only two of the fifty regulated gas utilities in the relevant service areas in Kansas and Missouri have brought suit. On the other hand, the attorneys general of only two of the four states in which Utilicorp and KP&L distribute natural gas have brought suit. Thus, only Utilicorp and KP&L are seeking damages on account of the overcharge applicable to natural gas consumed by residential customers in Nebraska and Oklahoma.[6]

Finally, the States argue (Brief at 23) that Section 4C of the Clayton Act gives them "standing to bring antitrust suits on behalf of 'natural persons' injured by antitrust violations, regardless of whether those persons are direct or indirect purchasers." Indeed, the States seem to be arguing that there should be a preference for *parens patriae* actions. They are wrong on both counts.

> First, this Court has already held that Section 4C did not alter the definition of which overcharged persons were injured within the meaning of § 4. It simply created a new procedural device -- *parens patriae* actions by States on behalf of their citizens -- to enforce existing rights of recovery under § 4. . . . [T]he *parens patriae* provision "creates no new substantive liability"; . . . it was intended only as "an alternative means . . . for the vindication of existing substantive claims."

[6] The forty-six states who have joined as *amici curiae* in support of the petitioners assert (Brief at 21) that "[s]tate attorneys general have the incentive and the experienced, specialized antitrust counsel to prosecute these suits on behalf of their citizens." Perhaps some of those forty-six attorneys general have "experienced, specialized antitrust counsel" on their staffs, but Kansas and Missouri here, and Illinois in *Panhandle Eastern*, are all represented by private law firms, who are presumably motivated by the same incentive as the private law firms representing the utilities.

Illinois Brick, 431 U.S. at 733 n.14, quoting H.R.Rep. No. 94-499 at 9 (1975), 1976 U.S. Code Cong. & Admin. News 2572, 2578. Thus, the *parens patriae* claims of the States here are only as good as would be claims brought by residential customers on their own behalf.

Second, there is no reason to favor *parens patriae* actions over actions brought by private parties. Indeed, if anything, they should be disfavored because they bring with them a risk that political considerations will affect the litigation process. A state attorney general might bring a case that really should not be brought in order to secure publicity, or might refrain from bringing a case that should be brought in order to avoid offending a supporter. Similarly, political considerations could affect a state attorney general's willingness to settle a case. *Parens patriae* actions have a role to play where there is no private plaintiff ready, willing and able to seek relief for antitrust injury suffered by consumers who are direct purchasers. There is no reason, however, to create a special rule to encourage them on behalf of consumers who are indirect purchasers.

The essence of the States' argument is really that the *Hanover Shoe/Illinois Brick* rule is not perfect. This is true -- and the Court has acknowledged as much from the outset. The States complain bitterly (Brief at 19) because the decision below denies "truly-injured parties of their claims." This, too, is true, and also has

been recognized by this Court as a likely effect of the rule against antitrust recovery by indirect purchasers:

> It is true that, in elevating direct purchasers to a preferred position as private attorneys general, the *Hanover Shoe* rule denies recovery to those indirect purchasers who may have been actually injured by antitrust violations.

Illinois Brick, 431 U.S. at 746. But to paraphrase Winston Churchill's observation about democracy, no one pretends that the *Hanover Shoe/Illinois Brick* rule is perfect or all-wise. Indeed, it may be the worst way to avoid over-complicating treble-damage actions and to ensure that someone will have the incentive to sue for redress of antitrust injury -- except for all those other approaches to this problem that have been suggested from time to time. Almost from the day *Illinois Brick* was decided, Congress has been trying to find some way to permit indirect purchasers to seek redress for antitrust injury. *See, e.g.*, S. 1962, 100th Cong., 1st Sess. (1987); S. 2022, 99th Cong., 2d Sess. (1986); S. 2481, 99th Cong. 2d Sess. (1986); S. 915, 98th Cong., 1st Sess. (1983); S. 300, 96th Cong., 1st Sess. (1977); S. 1874, 95th Cong., 1st Sess. (1977); H.R. 2060, 96th Cong., 1st Sess. (1979); H.R. 2204, 96th Cong., 1st Sess. (1979); H.R. 8359, 95th Cong., 1st Sess. (1977). But nothing has come of any of these efforts because Congress has never been persuaded that any particular proposed change would yield on balance a better result than this Court's rule. For the same reason, the Court should now decline the petitioners' request that it modify the *Hanover Shoe/Illinois Brick* rule.

CONCLUSION

The judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

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